POLICE DEPARTMENT CITY OF NEW YORK

March 30, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Daniel Haggerty
Tax Registry No. 947767
101 Detective Squad
Disciplinary Case No. 2014-12759

Charges and Specifications:

1. Said Police Officer Daniel Haggerty, on or about June 20, 2013 at approximately 1525 hours, while assigned to the 103rd Command and on duty, in the vicinity of South Road and 157th Street, Queens County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched a vehicle in which Person A was an occupant without sufficient legal authority.

   P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

Appearances:

For CCRB-APU: Nicole Junior, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, New York 10007

For Respondent: John Tynan, Esq.
Worth, Longworth & London, LLP
111 John Street – Suite 640
New York, New York 10038

Hearing Dates:

December 2, 2015
Trial record closed February 19, 2016

Decision:

Guilty

Trial Commissioner:

DCT Rosemarie Maldonado

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on December 2, 2015. The trial record was closed February 19, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. CCRB entered into evidence the recording of the 911 call that Person A made on August 15, 2013 and the statement he made to CCRB investigators on September 16, 2013. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The following is a summary of the undisputed facts. On June 20, 2013, Respondent was assigned to the 103 Precinct Anti-Crime Unit. (Tr. 11) On that day he was riding with his partner, Officer Stephen Lalchan, in an unmarked Department vehicle when, at approximately 1500 hours, they encountered a group of males at a basketball court on the corner of [redacted] and [redacted], Queens. Respondent testified that they approached the group because that location was known for "drug dealing" and had been the site of "multiple shootings." (Tr. 11-12, 22-23)[1] Although Respondent did not recall, Person A told the CCRB that he was at the basketball court when the officers intervened. Soon thereafter, in the vicinity of [redacted] and [redacted] Street, the officers

[1] Person A contended that he was "standing around" with a group of friends after a basketball game when Respondent and Lalchan approached and instructed them to disperse. (CCRB Exhibit ("CCRBX") 1 at 5-7) As reflected in the following exchange, at trial Respondent was equivocal on this point. Question: "At that time did you have the occasion to see Mr. Eugene Evans on the street within the confines of the 103rd Precinct?" Answer: "Yeah. It was a group of males; he could have been involved. I don't remember if he was exactly there." (Tr. 11, 23)

pulled over Person A's vehicle for a broken rear light. (Tr. 13) An officer asked Person A to step out and the vehicle was searched. (Tr. 14-15, 35) No summons was issued but Person A was advised to fix the rear light. He complied. (Tr. 18)

Although the parties agree that Person A's vehicle was searched after being stopped for a broken tail light, in dispute is whether Respondent conducted that vehicle search. Person A readily admitted to CCRB investigators that his rear light was out and that a mechanic replaced the bulb later that day. (CCRB Exhibit ("CCRBX") 1 at 20) He objected, however, to the treatment he received and to the vehicle search. According to Person A, an officer "of Indian descent"[2] opened his car door, "snatched" his phone and ordered him to step toward the rear of the vehicle. (CCRBX 1 at 8) The officer "of Indian descent" then spoke to him in a "threatening" manner and asked if there was anything "sharp" in his pockets. Person A responded, "[y]ou're crazy." According to Person A, the officer also inquired about a decade old narcotics violation. (CCRBX 1 at 13, 21-22)

Person A informed CCRB that during his interaction with the officer "of Indian descent," the "Caucasian officer" entered and searched his vehicle. (CCRBX 1 at 8) Specifically, he saw the "Caucasian officer" "flip the seat covers, go into his glove compartment and console and move the seats back and forth." He also noted that items stored in the visor and glove compartment were removed. (CCRBX 1 at 3, 8, 12-14) Person A purportedly "kept [his] cool," but admittedly declared that the officer had "no right to be in [his] vehicle." (CCRBX 1 at 11, 14) Later that day, he visited the 103 Precinct to retrieve his cell phone and file a complaint. After being told that his cell phone was in the car, he found it under the front seat. (CCRBX 1 at 3-5, 18-19)

[2] Respondent agreed that Lalchan is of Indian descent, specifically noting that he is Guyanese. (Tr. 22)

Respondent testified at trial that after observing Person A's movements he became suspicious that he was in possession of a weapon. Specifically, he claims to have seen Person A "dip" to the right, left and front while inside the car. (Tr. 25-26) He did not recall whether Lalchan actually opened the driver's side door, but testified that Lalchan had Person A step out of the vehicle and walk to the rear where he was positioned with his back leaning against the trunk of the car. He described Person A as "irate" but could not remember what he said. (Tr. 15-16, 27-28, 32-33) According to Respondent, while he engaged Person A, Lalchan searched the "lungeable/ grabbable" areas of the vehicle. (Tr. 16, 33). He explained that this could have included the center console, glove compartment, back seat and under the seats. (Tr. 35-36)

The first issue this tribunal must decide is whether Respondent actually engaged in the alleged misconduct. For the reasons set forth below, I find that the preponderance of the credible evidence proved that it was Respondent, and not Lalchan, who conducted the search.

Although hearsay is admissible in this forum, there are significant reasons for caution in cases such as this where an out-of-court statement is central to the determination of the case. *See Matter of Ayala v. Ward*, 170 A.D.2d 235 (1st Dept. 1991); *Disciplinary Case No. 77005/01*, p. 6 (May 27, 2002) (hearsay declarations may be insufficient to support findings of guilt in cases that pose close questions of credibility). In this case, however, Person A's statement to the CCRB had sufficient indicia of reliability to be probative on the issue of officer identity. First, Person A told CCRB investigators with specificity that an officer "of Indian descent" ordered him out of the vehicle and stood with him while the Caucasian officer searched the vehicle's interior.

Having listened to the recording of that interview, and having read the transcript, I note that Person A sounded entirely confident in his identification of each officer's role. Second, Person A complained to CCRB and expressed equal displeasure about what he considered the egregious conduct of both Respondent and Lalchan and at having been approached by them twice in one day. Given the indignation directed at both officers it is unlikely that Person A would have falsely accused Respondent of having conducted the search if Lalchan had done so. Finally, it is unlikely that this is a case of mistaken identity given that there is no dispute that Lalchan is Guyanese and of Indian descent and that Respondent is Caucasian. The Department photographs of these officers confirm that their distinct complexions and physical traits conform to the descriptions provided by Person A. (Court Exs. 1, 2) Furthermore, unlike a physical altercation where the identification of participants can be made difficult by the "fog of war," this was a distinct incident involving two separate officers who took on defined roles.

Second, I do not credit Respondent's trial assertions that his partner conducted the search. Respondent was an evasive and reticent witness who made contradictory statements about the vehicular stop. For example, Respondent told CCRB investigators at both his December 2013 and February 2014 interviews that he did not remember who searched the car. (Tr. 33-34) He also failed to recall details such as who was driving and who told Person A to step out of the vehicle. (Tr. 29) In contrast, at trial Respondent was certain that Lalchan operated the RMP, removed Person A from the vehicle and conducted the search. (Tr. 13-14)

Respondent attempted to attribute these discrepancies to being caught "off guard" at the CCRB interviews and to subsequent conversations with Lalchan about the car stop.

(Tr. 20-22, 29-33) Although there are admittedly numerous mechanisms to refresh one's recollection about an event, I do not believe Respondent's unsupported claim that his recollection about the vehicular stop improved so significantly almost two and a half years after the incident. The subsequent recollection of specific details, such as Person A's exact position and posture when he stood by the trunk of the car and who was driving, demonstrates this point. I was also troubled by Respondent's illogical assertion that his conversations with Lalchan helped his recollection while simultaneously insisting that his memory had been the same. (Tr. 21) In sum, Respondent's vague and conflicting responses seemed more calculated to limit his personal liability than to present a genuine recitation of facts. Having weighed all of the evidence and testimony, I find that the preponderance of the credible evidence indicates that it was Respondent who searched Person A's vehicle.

This tribunal must next determine whether Respondent engaged in misconduct by conducting the search. For the following reasons, I find that he did.

New York State courts recognize that a police officer's entry into an automobile and inspection of the personal effects therein are significant encroachments on a motorist's privacy interests. The Court of Appeals found in *People v. Torres* that where occupants had been ordered out of the vehicle and frisked without incident, police officers could not then search the vehicle based on a conclusory belief that harm could occur after the investigation if a weapon is in the vehicle. 74 N.Y.2d 224 (1989).

More recently, in *People v. Newman*, the Appellate Division First Department addressed the question of what showing must be made to search an unoccupied vehicle

following a traffic stop.[3] 96 A.D.3d 34 (2012). The Court opined, "[w]here a vehicle's occupants have been 'removed . . . without incident [such that] any immediate threat to [the officer's] safety [has been] eliminated,' it is generally unlawful for the officer - - in the absence of probable cause - - to 'invade the interior of a stopped car.'" *Id.* at 41, *citing People v. Carvey*, 89 N.Y.2d 707, 710 (1997), *citing Torres*, 74 N.Y.2d at 226. Only where information is revealed during the stop that indicates a substantial likelihood of a weapon being present in the vehicle which poses "an actual and specific danger" to the officer's safety is an officer justified in "engaging in a 'limited intrusion' into the suspect's vehicle." *Newman*, 96 A.D.3d at 42, *quoting Carvey*, 89 N.Y.2d at 710-11. The Court specified that an "officer must have more than reasonable suspicion" that a weapon is in the vehicle; "mere hunch or gut reaction will not do." *Newman*, 96 A.D.3d at 42, *citing People v. May*, 52 A.D.3d 147 (2008). Finally, the Court added that, "[c]onclusory assertions by an officer that a car's occupants have engaged in 'furtive behavior' or caused them apprehension cannot validate further intrusions into the interior of a vehicle." *Id.*

Here, Respondent claimed that Person A might have possessed a weapon because he "dipped" down. This reasoning is insufficient on its face. His description of Person A as "irate," without more, also falls short of the level of suspicion required to justify a search – particularly pursuant to a stop for a minor traffic violation. In sum, Respondent's testimony failed to persuade this tribunal that there were objective indicators that would lead a reasonable police officer to believe that there was a weapon in the vehicle that

[3] The First Department distinguished this set of circumstances from *Arizona v. Gant*, 556 US 332 (2009), noting that *Gant* applies only where a search occurs incident to arrest. For the same reason, *Gant* is inapplicable to the instant matter.

posed a "specific" and "actual" danger to his or her safety. Accordingly, I find Respondent guilty of the charged misconduct.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 21, 2008. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The APU prosecutor requested a penalty of five vacation days. Given Respondent's evasiveness at trial, and the gratuitous nature of the unjustifiable vehicle search, I find that the slightly higher penalty requested by the CCRB in this case is appropriate. *See Disciplinary Case No. 2013-11066* (September 2, 2015) (Fourteen-year police officer with two prior adjudications forfeited five vacation days for searching a vehicle without sufficient legal authority and making a discourteous remark to the driver); *Disciplinary Case No. 2013-9777* (July 27, 2015) (Eighteen year police officer with one prior adjudication forfeited six vacation days for improperly searching a vehicle and frisking its occupant)

Respectfully submitted,

Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

MAY 25 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

POLICE DEPARTMENT CITY OF NEW YORK

From: Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER DANIEL HAGGERTY
TAX REGISTRY NO. 947767
DISCIPLINARY CASE NO. 2014-12759

Respondent was appointed to the Department on July 21, 2008. His last evaluations were as follows: he received 3.5 overall ratings of "Highly Competent/Competent" in 2015 and 4.5 ratings of "Extremely/Highly Competent" in 2013 and 2014. He has received nine medals for Meritorious Police Duty.

[redacted]

Respondent has no prior formal disciplinary history.

Rosemarie Maldonado
Deputy Commissioner Trials